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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 368

THE SIOUX TRIBE OF INDIANS,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF

RALPH H. CASE,
Counsel for Petitioner.

JAMES S. Y. IVINS,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Sioux Tribe of Indians, by its attorney, Ralph H. Case, prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above-entitled cause on February 4, 1946.

Opinion Below

The opinion below is reported in 64 Fed. Supp. 303; it also appears in the transcript, pp. 87-102.

Jurisdiction

The judgment of the Court of Claims was entered February 4, 1946. Plaintiff's motion for new trial was overruled May 5, 1946. The jurisdiction of this Court is invoked under Section 288(b) of Title 28 of the United States

Code as amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statement

By the treaty of April 29, 1868 (15 Stat. 635) a permanent reservation in Dakota Territory was established for the Sioux Tribe, in which it had permanent use and occupation of some twenty-eight million acres, and rights to roam and hunt over some thirty-nine million acres of surrounding lands.

After the discovery of gold in the Black Hills, the reservation was reduced in 1877 to less than twenty-one million acres, and the hunting rights were terminated. In 1889, the Government desired to take still more of the Sioux reservation for settlement by whites, and the reservation was reduced by another 9,265,592 acres.

The 1868 treaty had provided against taking of tribal lands from the Indians except on written consent of three-fourths of the adult male Indians. So a commission was sent to explain the terms of the 1889 Act to the Indians and procure their signatures. The Commission made statements to the Indians, on the basis of which they accepted the terms of the Act of March 2, 1889, and signed the agreement.

The act provided, among other things, for the sale of lands out of the middle of the reservation, so what was left to the Indians was in six separate "diminished reservations."[1] This left a total area of 14,010,429.49 acres in the six *diminished* reservations.

The Act of March 2, 1889, provided for the sale to homestead entrymen; transfer to the States of South Dakota and North Dakota of school lands; sales to railroad companies,

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[1] Standing Rock, Cheyenne River, Crow Creek, Lower Brule, Rosebud and Pine Ridge.

churches and missionary societies; and gifts of islands in the Missouri River to designated towns.

The Act also provided for prices of the lands sold to and entered by homesteaders, on a sliding scale—and the deposit in a "Sioux Nation Fund" of the proceeds.

This provision was not complied with.

Petitioner filed suit under the Act of June 3, 1920, which resulted in the decision by the Court of Claims dated December 7, 1942 (97 Ct. Cl. 391, 406), holding the defendant below accountable for $5,307,655.87 and interest and continuing the case for further proceedings.

In the further proceedings the Court below found that the Sioux Nation Fund, including both principal and interest, should have been, on June 30, 1925, the sum of $10,373,382.76. Against this there were charged the following disbursements, to which no exception is taken by petitioner:

Surveying and allotting	$634,466.99
Interest fund expenditures	4,183,767.21
Permanent fund expenditures	2,028,394.40
Total	$6,846,628.60

This should have left a net judgment for petitioner in the sum of $3,526,754.16.

However, the Court below held that the disbursements for Sioux Benefits to individual members of the Sioux Tribe in the sum of $8,438,038.38 were gratuities chargeable against the Sioux Nation Fund (R. 47).

The payments called "Sioux Benefits" are made under the first proviso to Section 17 of the Act of March 2, 1889, 25 Stat. 888, at page 895, and were made only to those Sioux Indians who accepted allotment in severalty and who were the head of a family or single and over 18 years of age. The permanent appropriation to pay "Sioux Benefits" is part

of the said first proviso to Section 17, supra, and all "Sioux Benefit" payments have been made and are now being made out of the Treasury of the United States.

No part of any payment of "Sioux Benefits" has ever been charged against the Sioux Nation Fund by the Department of the Interior, the Treasury Department or by the Comptroller General.

Subsequent to the repeal in 1935 of all permanent appropriations including that in Section 17 of the Act of March 2, 1889, the Congress has annually appropriated moneys from the general fund to pay "Sioux Benefits."

This set-off, which petitioner says is in error, resulted in the cancellation of the entire balance of $3,526,754.16 found by the Court below to be due petitioner—and further left a net excess of expenditures, over the sum due petitioner, amounting to $4,911,284.22.

It is on the error of the Court below in charging the sum of $8,438,038.38 against the Sioux Nation Fund that this petition for certiorari is filed.[2]

Statutes Involved

The pertinent statutes are indicated in the Appendix below, pp. 8-17.

Questions Presented

(1) Whether the so-called "Sioux Benefits" payable to individuals under Section 17 of the Act[3] of March 2, 1889,

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[2] In this and the other actions brought by the Sioux Tribe against the United States, the defendant filed an accounting by the General Accounting Office, consisting of seven volumes and covering all land and financial transactions between the Sioux Tribe and the United States under all Treaties and Acts of Congress relating thereto. This accounting and report goes down to June 30, 1925. It is accepted by petitioner as accurate, and all figures herein with respect to land areas and amounts of money involved are taken from the Report of the General Accounting Office.

[3] "An Act to divide a portion of the reservation of the Sioux Nation" etc., amended by Act of June 10, 1896 (29 Stat. 334) and Act of June 21, 1906 (34 Stat. 325).

c. 405, 25 Stat. 888, 895, were properly chargeable against the permanent Sioux Nation Fund created by said section or a proper offset against the allowed claim of the plaintiff tribe for payments due from the United States under said act.

(2) If the statement in finding 15 of the Court of Claims that "the beneficial agricultural objects and cash payments provided for in section 17 for the tribal allottees under the agreement" were "reimbursable expenditures" under the Act of March 2, 1889, is a finding of fact, or a mixed conclusion of fact and law, whether there is any substantial evidence in the record to support it.

(3) Whether there is any substantial evidence in the record to support the finding in finding 15 of the Court of Claims to the effect that section 17 of the Act of March 2, 1889 was explained to and understood by the plaintiff Indians as providing that the "Sioux Benefits" paid to individuals by the United States should be reimbursed out of proceeds from the sale of ceded lands.

Specifications of Error

The Court of Claims erred:

(1) In holding (Finding 15, R. 60-66) that "the beneficial agricultural objects and cash payments provided for in section 17 [of the Act of March 2, 1889] for the tribal allottees under the agreement" were "reimbursable expenditures," and (Finding 9, R. 46-49) that they constituted a proper set-off against the tribal claims which the Court held allowable.

(2) In holding (Finding 15, R. 60-66) that "the agreement [Act of March 2, 1889] further contemplated and intended that after such ten-year period following Febru-

ary 10, 1890, the effective date of the agreement, all beneficial agricultural objects • • • as should be necessary, should be provided and furnished out of the permanent fund principal and interest and miscellaneous receipts."

Reasons for Granting the Writ

(1) The decision is in conflict with *Sioux Tribe of Indians* v. *United States* (89 Ct. Cl. 31). There the Court of Claims denied to the Tribe the right to sue to enforce treaty rights of individual Indians, here it allows payments to such individuals, which could not have been enforced by the Tribe, to constitute counterclaims against the Tribe.

(2) The decision involves large sums of money ($8,438,-038.38) which would belong to all of the members of the Sioux Tribe—over 30,000 of them.

(3) The allowance of the offsets herein has been taken by the Court of Claims as setting up a debit balance against the Indians, on the basis of which that Court has dismissed the petitions in seven other cases, in five of which it found the plaintiff otherwise entitled to recover sums varying from $23,347.65 to $762,430.25, and aggregating $2,423,166.15.

(4) The effect of the decision of the Court of Claims is to set up a debit balance against the Sioux Tribe which will leave it perpetually in debt to the United States, not only for transactions passed upon by the Court but for moneys which Congress has been appropriating regularly for years subsequent to those covered in the litigation, by which it concedes that the United States is under obligation to continue paying "Sioux Benefits," and further for any such moneys which the Congress may hereafter appropriate.

(5) The decision of the Court of Claims is in conflict with the contemporaneous administrative construction placed upon the Act of 1889 at the time of its enactment.

(6) The decision of the Court of Claims is in conflict with long continued departmental construction of the Act of 1889 (1889-1945).

(7) The decision is in conflict with the meaning of the Act of 1889 as reflected in the appropriation acts every year[4] since the termination in 1935 of all permanent appropriations (see 48 Stat. 1224) (which ended the permanent appropriation of the 1889 Act); and it is in conflict with such Acts as those of June 10, 1896 (29 Stat. 334), May 21, 1928 (45 Stat. 684) and June 18, 1934 (48 Stat. 984).

(8) This is an action by an Indian tribe against the United States *as* guardian *and trustee* of a fund derived from the sale of petitioner's lands. The ward is morally entitled to a decision by the highest court as to whether the trustee has properly executed its fiduciary function.

(9) The Jurisdictional Act of June 3, 1920, 41 Stat. 738, under which this action was begun, gave the petitioner a right of appeal to the Supreme Court. This Court has held that special jurisdictional acts of this type were amended by section 3 of the Act of February 13, 1925, limiting review to certiorari, but it is submitted that in the circumstances, a writ of certiorari should not be denied to petitioner unless it is clear to this Court that the judgment below was correct.

RALPH H. CASE,
Attorney of Record for Petitioner,
Southern Building,
Washington 5, D. C.

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[4] See Appendix.

APPENDIX

Act of June 3, 1920, 41 Stat. 738

That all claims of whatsoever nature which the Sioux Tribe of Indians may have against the United States, which have not heretofore been determined by the Court of Claims, may be submitted to the Court of Claims with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under any treaties, agreements, or laws of Congress, or for the misappropriation of any of the funds or lands of said tribe or band or bands thereof, or for the failure of the United States to pay said tribe any money or other property due; and jurisdiction is hereby conferred upon the Court of Claims, with the right of either party to appeal to the Supreme Court of the United States, to hear and determine all legal and equitable claims, if any, of said tribe against the United States, and to enter judgment thereon.

Sec. 2. That if any claim or claims be submitted to said courts they shall settle the rights therein, both legal and equitable, of each and all the parties thereto, notwithstanding lapse of time or statutes of limitation, and any payment which may have been made upon any claim so submitted shall not be pleaded as an estoppel, but may be pleaded as an offset in such suits or actions, and the United States shall be allowed credit for all sums heretofore paid or expended for the benefit of said tribe or any band thereof. The claim or claims of the tribe or band or bands thereof may be presented separately or jointly by petition, subject, however, to amendment, suit to be filed within five years after the passage of this Act; and such action shall make the petitioner or petitioners party plaintiff or plaintiffs and the United States party defendant, and any band or bands of said tribe or any other tribe or bands of Indians the court may deem necessary to a final determination of such suit or suits may be joined therein as the court may order. Such petition, which shall be verified by the attorney or attorneys employed by said Sioux Tribe or any

bands thereof, shall set forth all the facts on which the claims for recovery are based, and said petition shall be signed by the attorney or attorneys employed and no other verification shall be necessary. Official letters, papers, documents, and public records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said tribe or bands thereof to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys for the said tribe or bands of Indians. * * *

Act of March 2, 1889, 25 Stat. 888

* * * * * * *

Sec. 8. That the President is hereby authorized and required whenever in his opinion any reservation of such Indians, or any part thereof, is advantageous for agricultural or grazing purposes, and the progress in civilization of the Indians receiving rations on either or any of said reservations shall be such as to encourage the belief that an allotment in severalty to such Indians, or any of them, would be for the best interest of said Indians, to cause said reservation, or so much thereof as is necessary, to be surveyed, or re-surveyed, and to allot the lands in said reservation in severalty to the Indians located thereon as aforesaid, in quantities as follows: To each head of a family, three hundred and twenty acres; to each single person over eighteen years of age, one-fourth of a section; to each orphan child under eighteen years of age, one-fourth of a section; and to each other person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-eighth of a section. In case there is not sufficient land in either of said reservations to allot lands to each individual of the classes above named in quantities as above provided, the lands embraced in such reservation or reservations shall be allotted to each individual of each of said classes pro rata in accordance with the provisions of this act: *Provided*, That where the lands on any reservation are mainly valuable for grazing purposes, an additional allotment of such grazing

lands, in quantities as above provided, shall be made to each individual; or in case any two or more Indians who may be entitled to allotments shall so agree, the President may assign the grazing lands to which they may be entitled to them in one tract, and to be held and used in common.

Sec. 9. That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each oprhan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: *Provided*, That if any one entitled to an allotment shall fail to make a selection within five years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which selection shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner: *Provided*, That these sections as to the allotments shall not be compulsory without the consent of the majority of the adult members of the tribe, except that the allotments shall be made as provided for the orphans.

* * * * * * *

Sec. 17. That it is hereby enacted that the seventh article of the said treaty of April twenty-ninth, eighteen hundred and sixty-eight, securing to said Indians the benefits of education, subject to such modifications as Congress shall deem most effective to secure to said Indians equivalent benefits of such education, shall continue in force for twenty years from and after the time this act shall take effect; and the Secretary of the Interior is hereby au-

thorized and directed to purchase, from time to time, for the use of said Indians, such and so many American breeding cows of good quality, not exceeding twenty-five thousand in number, and bulls of like quality, not exceeding one thousand in number, as in his judgment can be under regulations furnished by him, cared for and preserved, with their increase, by said Indians: *Provided,* That each head of family or single person over the age of eighteen years, who shall have or may hereafter take his or her allotment of land in severalty, shall be provided with two milch cows, one pair of oxen, with yoke and chain, or two mares and one set of harness in lieu of said oxen, yoke and chain, as the Secretary of the Interior may deem advisable, and they shall also receive one plow, one wagon, one harrow, one hoe, one axe, and one pitchfork, all suitable to the work they may have to do, and also fifty dollars in cash; to be expended under the direction of the Secretary of the Interior in aiding such Indians to erect a house and other buildings suitable for residence or the improvement of his allotment; no sales, barters or bargains shall be made by any person other than said Indians with each other, of any of the personal property hereinbefore provided for, and any violation of this provision shall be deemed a misdemeanor and punished by fine not exceeding one hundred dollars, or imprisonment not exceeding one year or both in the discretion of the court; That for two years the necessary seeds shall be provided to plant five acres of ground into different crops, if so much can be used, and provided that in the purchase of such seed preference shall be given to Indians who may have raised the same for sale, and so much money as shall be necessary for this purpose is hereby appropriated out of any money in the Treasury not otherwise appropriated; and in addition thereto there shall be set apart, out of any money in the Treasury not otherwise appropriated, the sum of three millions of dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest of which, at five per centum per annum, shall be appropriated, under the direction of the Secretary of the Interior, to the use of the Indians receiving rations and

annuities upon the reservations created by this act, in proportion to the numbers that shall so receive rations and annuities at the time this act takes effect, as follows: One-half of said interest shall be so expended for the promotion of industrial and other suitable education among said Indians, and the other half thereof in such manner and for such purposes, including reasonable cash payments per capita as, in the judgment of said Secretary, shall, from time to time, most contribute to the advancement of said Indians in civilization and self-support; and the Santee Sioux, the Flandreau Sioux, and the Ponca Indians shall be included in the benefits of said permanent fund, as provided in sections seven and thirteen of this act: *Provided,* That after the Government has been reimbursed for the money expended for said Indians under the provisions of this act, the Secretary of the Interior may, in his discretion, expend, in addition to the interest of the permanent fund, not to exceed ten per centum per annum of the principal of said fund in the employment of farmers and in the purchase of agricultural implements, teams, seeds, including reasonable cash payments per capita, and other articles necessary to assist them in agricultural pursuits, and he shall report to Congress in detail each year his doings hereunder. And at the end of fifty years from the passage of this act, said fund shall be expended for the purpose of promoting education, civilization, and self-support among said Indians, or otherwise distributed among them as Congress shall from time to time thereafter determine. * * *

* * * * * * *

Sec. 19. That all the provisions of said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding. * * *

* * * * * * * *

Sec. 22. That all money accruing from the disposal of lands in conformity with this act shall be paid into the Treasury of the United States and be applied solely as follows: First, to the reimbursement of the United States for all necessary actual expenditures contemplated and provided for under the provisions of this act, and the creation of the permanent fund hereinbefore provided; and after such reimbursement to the increase of said permanent fund for the purposes hereinbefore provided. * * *

* * * * * * *

Sec. 28. That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians, concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required, by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation of this act becomes of no effect and null and void. * * *

Act of January 19, 1891

That the following sums, or so much thereof as may be necessary, be, and the same are hereby, appropriated, out of any moneys in the Treasury not otherwise appropriated, to be immediately available to enable the Secretary of the Interior to comply with and carry out certain provisions of the act of Congress approved March second, eighteen hundred and eighty-nine (public one hundred and forty-eight, Statutes twenty-five, page eight hundred and eighty-eight), and for other purposes:

For the erection of day and industrial schools, providing furniture and other necessary articles, and pay of teachers, in accordance with article seven of the treaty of April twenty-ninth, eighteen hundred and sixty-eight, which said

article of treaty is continued in force for twenty years by section seventeen of the above-mentioned act of March second, eighteen hundred and eighty-nine: *Provided,* That as fast as school facilities are furnished the Secretary of the Interior is hereby authorized and required to compel all children between the ages of six and sixteen to attend the schools on the reservation at least nine months in the year, except such as may be attending school elsewhere, one hundred and fifty thousand dollars.

For the erection of fifteen school buildings, provided for in article twenty of the above-mentioned act of March second, eighteen hundred and eighty-nine, fifteen thousand dollars.

To enable the Secretary of the Interior to pay to such individual Indians of the Standing Rock and Cheyenne River Agencies as he shall ascertain to have been deprived by the authority of the United States of ponies in the year eighteen hundred and seventy-six, at the rate of forty dollars for each pony: *Provided,* That the sum paid to each individual Indian under this provision shall be taken and accepted by such Indian in full compensation for all loss sustained by such Indian in consequence of the taking from him of ponies as aforesaid: *And provided further,* That if any Indian entitled to such compensation shall have deceased the sum to which such Indian would be entitled shall be paid to his heirs at law, according to the laws of the State of Dakota, two hundred thousand dollars.

To enable the Secretary of the Interior to purchase for the Sioux Nation of Indians additional beef required for issue, the rations having been reduced on account of reduced appropriation for the fiscal year ending June thirtieth, eighteen hundred and ninety, one hundred thousand dollars.

To enable the Secretary of the Interior to purchase lands for such of the Santee Sioux Indians in Nebraska as have been unable to take lands in severalty on their reservations in Nebraska by reason of the restoration of the unallotted lands to the public domain, thirty-two thousand dollars.

Sec. 2. That the funds appropriated by this act shall not be liable to be covered into the Treasury, but shall

remain on said books until used and expended for the purposes for which they have been appropriated.

Sec. 3. That the principal of the permanent fund provided for under section seventeen of the said act of March second, eighteen hundred and eighty-nine, dividing a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations, and for other purposes, shall be divided in proportion to the number of Indians entitled to receive rations and annuities upon the separate reservations created by the above act, or residing and belonging thereon at the time the said act took effect, and the Secretary of the Treasury shall carry the amount of principal of said permanent fund belonging to the Indians of each of the diminished reservations to the credit of the Indians of each of the said diminished reservations, separate and distinct from each other, and the principal as well as the interest of each of said funds shall be expended for the purposes specified in said article seventeen of the above-mentioned act, only for the use and benefit of the said Indians so entitled to receive rations and annuities upon each of the said separate diminished reservations or so residing and belonging thereupon.

Sec. 4. That the Secretary of War be, and he is hereby, authorized and directed when making purchases for the military post or service on or near Indian reservations to purchase in open market, from the Indians as far as practicable at fair and reasonable rates, not to exceed the market prices in the localities, any cattle, grain, hay, fuel, or other produce or merchandise they may have for sale and which may be required for the military service. • • •

Act of June 10, 1896, 29 Stat. 334

The Secretary of the Interior is hereby authorized and directed to ascertain the number of Sioux and Ponca Indians in South Dakota and Nebraska who would not be benefited by the fulfillment of the proviso of section seventeen of an Act entitled "An Act to divide a portion of the reservation of the Great Sioux Nation of Indians in Dakota into separate reservations and secure the relinquishment

of the Indian title to the remainder, and for other purposes," approved March second, eighteen hundred and eighty-nine, by the receipt from the United States of the articles of personal property therein mentioned and who desire to have the same converted into money, and in lieu of such articles of personal property, or any part thereof he may think proper, the Secretary of the Interior shall convert or commute the same, or so much thereof as he may think proper, into money, and pay the amount thereof to such Indians; and the payment under the provisions of this Act shall be held to be a liquidation of the obligation of the United States to said Indians under that portion of said section seventeen, so far as the articles of personal property therein named are concerned.

Act of June 21, 1906, 34 Stat. 326

* * * * * * *

That in lieu of the milch cows, mares, and implements to be issued to Sioux allottees under the provisions of section seventeen of the "Act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes," approved March second, eighteen hundred and eighty-nine, the Secretary of the Interior may, in his discretion, issue to any allottee entitled to benefits under said section who shall petition therefor an equal value in good stock cattle.

Act of May 21, 1928

That the Secretary of the Interior be, and he is hereby, directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (Twenty-fifth Statutes at Large, page 894), or their commuted cash value under the Act of June 10, 1896 (Twenty-ninth Statutes at Large, page 334), to all Sioux Indians who shall have taken or may hereafter take allotments of land in severalty under section 19 of the Act of May 29, 1908 (Thirty-fifth Statutes at Large, page 451), and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval

shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. No person shall receive more than one allowance of the benefits, and application must be made and approved during the lifetime of the allottee or the right shall lapse.

Section 14 of the Act of June 18, 1934, 48 Stat. 984

The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (25 Stat. L. 895), or their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (35 Stat. L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, claims therefor to be paid as formerly from the permanent appropriation made by said section 17 and carried on the books of the Treasury for this purpose. * * *

BRIEF

The case presented in the preceding petition rests on the correct answer to one question. That question is,—"Are the disbursements to individuals for the so-called Sioux Benefits reimbursable to the United States out of trust funds of the Sioux Tribe of Indians, petitioners?"

The Court of Claims held such payments to be chargeable against the tribal funds of the Sioux Tribe. Petitioner says this is error and files its petition for certiorari asking this Court to correct the error, which, if allowed to stand, will result in the financial ruination of the petitioner. The charge by the Court below of $8,438,038.38 against Sioux tribal funds effectively wipes out all of the Sioux Nation fund, Act of March 2, 1889, and goes much farther and wipes out all trust funds derived from land sales made subsequent to the sale of 1889, then leaves a net deficit which, if the decision stands, will still be owing to the United States from the Sioux Tribe and which can never be paid.

The record in the case at bar is, for an Indian case, quite complete. The ambiguities and uncertainties which have been troublesome in prior cases, such as *Northwestern Shoshone Tribe of Indians* v. *The United States,* 324 U. S. 335, are not present here. True the one question has roots and branches but all of these show the error of the Court below, and all are so fully shown by the Record as to require reversal.

The portion of the Act of March 2, 1889, *supra,* which provides, *inter alia,* for the so-called Sioux Benefits is Section 17 (pp. 10-12). A study of that section throws a white light on the question here presented. There are two "Provisos" in Section 17. The first Proviso offers to each individual member of the Sioux Tribe who was the head of a family or a single person over the age of eighteen years,

as an inducement to accept his or her allotment of land in severalty, certain farm implements, seed for planting, farm animals and a small sum ($50) in cash. These are the "beneficial objects" referred to by the Court below and which are commonly called "Sioux Benefits." Then follows the appropriation to meet the cost thereof in these words—

> "and so much money as shall be necessary for this purpose is hereby appropriated out of any money in the Treasury not otherwise appropriated;"

Immediately there follows another appropriation in these words—

> "and in addition thereto there shall be set apart out of any money in the Treasury not otherwise appropriated, the sum of three millions of dollars, which said sum shall be deposited in the Treasury of the United States to the credit of the Sioux Nation of Indians as a permanent fund, the interest of which, at five per centum per annum, shall be appropriated, under the discretion of the Secretary of the Interior, to the use of the Indians receiving rations and annuities upon the reservations created by this Act."

Then follow directions for the use of the interest accruing annually on the $3,000,000 permanent fund.

There are two, separate appropriations, for two distinct purposes—one to pay the cost of the beneficial objects (Sioux Benefits) and the other to make a down payment for the 9,265,592 acres of land ceded to the United States for sale. The first is for payments to individuals in the future, the second is an immediate deposit for land. The Congress must have known what it was about. That is not an assumption, it is a presumption. Had the Congress intended that Sioux Benefits were to be charged against the permanent land sale fund, then there was no sense whatsoever in making the first appropriation. Moreover if that

had been the intent of the Congress the controlling words, "in addition thereto," would have been omitted.

It should be noted that the offer of Sioux Benefits to a strictly limited class of allottees is not a contract *in praesenti*, but is an offer to make a contract *in futuro*. Much remained to be done before the first possible delivery of the "beneficial objects" could be made. The lands in the diminished reservations must be surveyed, and the surveys approved; special allotting agents must be appointed and these agents must record the selections of land by all Sioux Indians entitled thereto; allotment rolls must be made up and approved and then, and only then, could the head of a family or a single person over the age of eighteen years make application for the "beneficial objects" to which he or she thus became entitled.

However, when that day arrived there was a permanent appropriation on the books of the Treasury ready to discharge the contract made between the individual Sioux Indians and the United States. That contract, to take an allotment voluntarily, is in no way a part of the land sale contract. The offer made by the United States to the limited class of individual Indians could have been omitted from the Act of March 2, 1889, *supra*, without affecting in any way the great land opening which was the primary purpose of that Act. Even included, as it is in the Act of 1889, it is set apart by a separate appropriation and by the words, "in addition thereto." Moreover, the Sioux Benefit provision has never been construed otherwise by any authority and has never been misconstrued by any authority except the Court of Claims.

There could have been no doubt as to the future cost of the Sioux Benefit provision in any normal mind, certainly not in the mind of the Congress. There were not less than 30,000 Sioux Indians and not less than 10,000 could, if they

wished, qualify for the Benefits. That estimate is most conservative. Facing a cost running up into many millions of dollars, the United States must have had a strong motive to offer to "give" the beneficial objects to the limited class to which the offer was made. That motive is, upon examination of the record, quite plain; in fact it is obvious.

By the Act of February 28, 1877, 19 Stat. 254, the United States acquired title to a large part of the Sioux permanent reservation created by the Treaty of April 29, 1868, 15 Stat. 625, including the very valuable gold-bearing lands in the Black Hills of Dakota Territory. As compensation for the vast and valuable area the United States bound itself to do certain things. Article V of the Act of 1877, *supra*, reads as follows:

> "In consideration of the foregoing cession of territory and rights, and upon full compliance with each and every obligation assumed by the said Indians, the United States does agree to provide all necessary aid to assist the said Indians in the work of civilization; to furnish to them schools and instruction in mechanical and agricultural arts, as provided for by the treaty of 1868. Also to provide the said Indians with subsistence consisting of a ration for each individual of a pound and a half of beef (or in lieu thereof, one-half pound of bacon), one-half pound of flour, and one-half pound of corn; and for every one hundred rations, four pounds of coffee, eight pounds of sugar, and three pounds of beans, or in lieu of said articles the equivalent thereof, in the discretion of the Commissioner of Indian Affairs. Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves."

It should be noted that the United States bound itself to furnish all necessary aid to assist the Indians in the work of civilization, to furnish them with schools and to furnish

the Indians with specified rations. The next sentence reads:

> "Such rations, or so much thereof as may be necessary, shall be continued until the Indians are able to support themselves."

In those words lie the motive, the compelling motive, for the offer to pay for the "beneficial objects" in the first proviso to Section 17 of the said Act of 1889.

The obligation to support 30,000 Indians is no small burden. The promise to furnish such support coupled with a promise that it shall be continued until the Indians are able to support themselves is not only a much greater burden but it robs, and did rob, those Indians of all incentive to become self-supporting. In the twelve years which passed between 1877 and 1889 annual appropriations were made by the Congress under the caption "Support and Civilization of the Sioux." If some way could be found to induce the Sioux Indians to go at farming and stock raising, then by that token and by so much as the Sioux produced, the United States would be relieved from the burden of "support" in Art. V of the said Act of 1877.

In 1923, present council for the Sioux Tribe sued the United States for the value of the Black Hills and surrounding lands. That case was decided adversely to the Sioux Tribe by the Court of Claims on June 1, 1942, 96 Ct. Cl. 579. Petition for writ of certiorari to this Court was filed, No. 769, October Term, 1942, which petition was denied April 19, 1943. The decision of the Court of Claims thus became final and the holding of the Court of Claims in that decision was before this Court and we assume still is. In that decision, on the question of the compensation which the United States bound itself to pay, as set out in Article V of the said Act of 1877, the Court of Claims held:

"By article 5 of that act, the Government assumed an obligation to continue to appropriate and expend such sums as should be necessary for such subsistence 'until the Indians are able to support themselves' in return for the Black Hills and hunting rights acquired, and, also added 900,000 acres of grazing land to the permanent reservation."

In 1889 it was recognized that it would be greatly to the advantage of the United States to be rid of the support of the Sioux Indians, even at considerable expense to the United States. In a letter to the President, dated January 30, 1890, transmitting the Report and Proceedings of the Sioux Commission (R. 110-320), John W. Noble, Secretary of the Interior, said: "The burdens assumed are light in comparison with the benefits obtained." If, however, the "burden" of paying for the "beneficial objects" was finally to be borne by the Sioux Indians, then the "benefits obtained" by the said Act of 1889 were at no cost or virtually no cost to the United States.

It is clear that the motive behind the Sioux Benefit offer was to induce the Sioux to become farmers and stockmen and ultimately self-supporting. It is also clear that the cost of Sioux Benefits was assumed and was expected to be paid out of the Treasury and not charged against the trust funds of the Sioux derived from the sale of their lands.

Representations Made to Plaintiff in 1889

Contemporaneous executive construction of the Act of 1889 is entitled to great weight in the determination of its meaning.[5] The constructions of the Act by the executive

[5] *Edwards* v. *Darby*, 12 Wheat 206, 210; *Jacobs* v. *Pritchard*, 223 U. S. 200, 214.

branch of the Government fall into classes: (1) the interpretations placed on the Act by the Commissioners who were sent out to procure the consent of the Indians, which will be discussed at this point; and (2) the accounting procedures of the Interior Department and the General Accounting Office which, with the actions of Congress indicating legislative interpretation, will be discussed later. It should be borne in mind at all times that we are dealing with a counterclaim and that the burden of proof is upon the Government to show that the items discussed should properly have been charged against the Sioux Fund.

Petitioner says that the representations to the Indians were not such as to justify a conclusion that the Indians must have understood that the "Sioux Benefits" were to be charged against the Sioux Nation Fund.

In Exhibit Acct. 1 (R. 107-320) are many pages of matter which are extraneous to the immediate question of what the Indians were given to believe was to be the source of the Sioux Benefits. It is hoped that by reading the passages indicated in the footnotes the Court will be able to satisfy itself readily as to the following primary facts.

The three members of the Sioux Commission went to six Indian Agencies and conferred there with such of the Sioux (parties to the Treaty of April 29, 1868, 15 Stat. 625) as attended.[6] A single member of the Commission also went to the Santee Agency and conferred with a tribe which had not been party to the Treaty of 1868, supra, but which was being given an interest under the Act of 1889.[7-8]

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[6] Rosebud Agency, R. 157, 400 Sioux.
Pine Ridge Agency, R. 187, 700 Sioux.
Lower Brule Agency, R. 216, 100 Sioux.
Crow Creek Agency, R. 222, 100 Sioux.
Cheyenne River Agency, R. 231, 500 Sioux.
Standing Rock Agency, R. 258, 500 Sioux.

[7-8] Santee Agency, R. 209, 140 Santees.

On the one hand, the Commissioners told the Indians that the great Sioux Reservation contained an immense quantity of land in excess of what the Sioux could possibly use, that lands to both the east and west of it were occupied by whites, that the whites were anxious to connect up through the reservation and would probably manage to whether the Indians agreed or not, and that accordingly it was proposed in the bill that if the Sioux would surrender approximately nine million acres of their great reservation the Government would sell that land then belonging to the Sioux, for their account, and would buy such of this surplus land as it could not sell to settlers.

On the other hand, the Commission stressed to the Indians the desire of the Government to see them take allotments of land on diminished reservations in severalty, to go to farming or cattle raising thereon and to become self-supporting, so that they would no longer need rations from the Government. To induce the individual Indians to take allotments in severalty the Government proposed to do various things.

The Commissioners told the Indians that, to assist them in farming or raising cattle, after taking allotments in severalty they were to be "given" oxen, cows, horses and farm implements.[9]

Under the Treaty of 1868, the Sioux who took up farming were given certain cattle, equipment and money *at the expense of the Government*. The Commissioners stressed to the Sioux the proposition that the Act of 1889 was more liberal to them in this connection than the Treaty of 1868, giving them more cattle, etc.[10] It is difficult to see how anybody would think that an Act which handed an Indian $500 worth of chattels and *made him pay for them*

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[9] R. 173, 195, 205, 218, 226, 230, 237-8, 270.

[10] R. 173, 292, 293-4, 303, 314, 315.

himself could be regarded as more liberal than one which gave him $350 worth at the expense of the Government. The only possible implication the Indians could have drawn was that if the Act of 1889 was more liberal than the Treaty of 1868, the chattels to be received by the Indians were not to be charged to the Indians. Certainly there was no greater liberality in the Act of 1889 than in the Treaty of 1868 as far as that concerned the land—that was all owned by the Indians anyhow and the only difference was that the more that was taken up in severalty the less they would have left in common. The Commissioners recognized that the land all belonged to the Indians.[11]

At some points the Commissioners instead of saying that stock, etc. would be *given* to the Indians, used the word "furnished," with the same implication that the cost thereof would not be charged to them.[12] At many points the Commissioners mentioned that the Government was going to buy 25 thousand cows and other things for the Indians.[13] These were for all the Indians, and the Court below has found that the cost thereof was not chargeable to the Sioux Fund. Immediately after speaking of the 25 thousand cows, etc., the Commission sometimes went right on to say that, further than this, the Government was buying for each Indian who took an allotment, horses, cows, etc.,[14] or that the Government was "*also giving*" to each such Indian stock and chattels.[15] Absolutely no distinction was drawn to indicate that the 25 thousand cows would be paid for by the Government but that the additional stock given to allottees would be charged back again against the Sioux Nation Fund.

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[11] R. 174, 242.
[12] R. 194, 228, 229, 235.
[13] R. 194, 218, 226, 230, 237-8, 243, 271.
[14] R. 195.
[15] R. 195, 205, 230.

The Commissioners further stressed the fact that the schools extended for 20 years were to be entirely without cost to the Indians, and sometimes in the same breath, the Commissioners went on to mention the horses, cattle, etc., without drawing any distinction in the manner of their acquisition.[16]

At Pine Ridge,[17] at Crow Creek,[18] and at Cheyenne River,[19] the Commission took pains to contrast the Indians' opportunity with that of the white settler, pointing out that the whites could homestead on only half as much land as the Indians could take in allotment, but also that the white man "must buy his own cattle, his own horses, his seeds," etc. The implication was unavoidable that the Indians would not have to buy these things *nor pay for them if the Government did the buying.*

At Pine Ridge,[20] the Commissioners were speaking of the "generosity" of the Great Father, who "gives to you, my friend, if you do this, a span of American brood mares." Where is any generosity involved in "giving" mares to a man and charging them to him?

The Commissioners continued, "More and more • • • he says I will issue you your clothing as now."[21] The clothing was at Government expense. No distinction was drawn between who would pay for it and who would pay for the mares.

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[16] E. g., R. 271, "furnishing *free* the cost of schools for the education of your children, furnishing you with the horses with which to improve your soil and the cattle from which to raise your herds and $50 in money with which to erect a little house." See similar tie-up between education and other items under Section 17, lumped without distinction under "he furnishes," R. 235.

[17] R. 204-5.

[18] R. 229.

[19] R. 238.

[20] R. 205.

[21] R. 205. See R. 201 for a similar tie-up with rations.

The Commissioners in their report described the fund which would result from the sale of the lands as the "Permanent Fund." In talking to the Indians they stated that after the three million dollars to be advanced by the Government was repaid out of land sales, the fund would be held at 5 per cent interest for *50 years.*[22] Even the dullest Indian would have realized that if all the "Sioux Benefits" to be given to allottees were to be charged against the great Sioux Fund, estimated by the Commissioners at five million dollars in excess of the three million dollars that was to be advanced and recouped, there would be nothing left to stay out at interest for 50 years, but the Commissioners kept telling them that they estimated that a balance of five million dollars would continue in the fund,[23] a thought consistent only with the idea that the "Sioux Benefits" were not to come out of the fund.

It is inconceivable that the Indians would have accepted the proposition and signed on the dotted line if they had believed that all these wonderful *gifts* and inducements offered by the Commission were to be charged against *their* money received from the sale of *their land.*[24] Except in two instances they did not even ask the question as to who was to pay for the beneficial objects to be allotted, and it is not conceivable that they would not have asked the question if they had thought that they were going to have to pay for the presents that were being so "generously" offered them.

In Nebraska, at the Santee Agency, outside of the great Sioux reservation, in the presence of 140 Santees, who were not regarded by the Sioux as owners of any part of the great Sioux reservation, Governor Foster, one of the

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[22] R. 213, 239, 242, 243, 248, 295.

[23] R. 243, 248, 295.

[24] R. 174.

Commissioners, was asked the direct question as to whether the money for the cows, etc., would come out of the Indians' fund or whether the Government would pay it. Governor Foster answered,

> "You are the first man who asked that question. The Commissioners have given this section a great deal of attention. The Department of the Interior has not instructed us as to the meaning of this section. Our opinion * * * is that the provisions for schools * * * the cost of which is to be paid by the Government and not out of the proceeds of the sale of your lands. The other things provided for in that section, the cost of these will come out of the proceeds of the sale of the lands."[25]

Governor Foster admitted that he had had no instructions. He was only one of three Commissioners. He was talking to Santees (140 of them), who did not get along well with the Sioux. There is no evidence that what he said then was ever communicated to any of the 2600 Sioux addressed by the Commissioners at the Sioux Agencies or any other Sioux who signed the contract. The Santees might have been satisfied, because they were settled in Nebraska and were getting a windfall in anything that might be allocated to them out of the sale of Sioux lands in Dakota. But the Sioux would not have been satisfied unless they were very badly misled, because the Act of 1889, if interpreted to charge "Sioux Benefits," paid to individual allottees, against the Sioux Nation Fund, would have left them very much worse off financially than they would have been under the Treaty of 1868 or the Act of 1877.

The direct question was raised only once more. That was at Standing Rock when all three Commissioners were

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[25] R. 214-5.

present with 500 Sioux, and John Grass raised the point. General Warner answered him saying,

> "The next question that you asked is as to the purchase of the cows and horses and the agricultural implements named in section 17. You asked if that money was to come from the three million dollars that was to be set aside as a fund in the treasury as soon as the treaty is ratified. I answer no." [26]

In speaking of the three million dollar fund, obviously General Warner merely used that to designate the entire fund that would result from the sale of the land because no distinction is made in the statute between the use of the money to be temporarily advanced by the Government and the use of the moneys received from the sale of land.

One more item indicates the contemporary construction placed by the Commissioners on the statute. When the Indians suggested that the fund derived from the sale of land should be divided into separate funds for each of the diminished reservations on a per capita basis,[27] the Commissioners recommended this,[28] and the Secretary of the Interior told the Indians at Washington that "the money that is to be paid will be recommended to be paid by the head according to each man so that every man in the Sioux Tribe will get his share," they were all acting upon the theory that the Sioux Fund belonged to *all* the Sioux. This idea is completely inconsistent with the thought that the Fund could become entirely depleted by distributions of Sioux Benefits to *some* of the Sioux. In later years, as numerous Sioux have decided to leave the reservations, they have been paid their capita shares of the Sioux Fund,[29]

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[26] R. 275.

[27] R. 303.

[28] R. 115, 123-4.

[29] Finding 4, R. 39, recognizes that $1,998,394.40 of the Fund was so paid out and properly charged against the Fund. *Cf.* R. 290.

regardless of whether or not they had previously had "Sioux Benefits" as allottees of land. This procedure is entirely inconsistent with the thought that the Sioux Benefits were chargeable against the Fund.

Executive Constructions

In its decision in this case, the Court below apparently ignored entirely the rule of law in regard to executive construction of a statute. Where a statute has been in effect for a long period of time and where the construction of that statute by the executive departments has been uniform, the decisions of the courts, particularly this Court, have been uniform in holding that the executive construction is entitled to great weight and should not be disregarded or overruled except for the most cogent reasons.

This rule is clearly stated in *United States* v. *Johnson*, 124 U. S. 236, and is as follows:

> "The contemporaneous construction of a statute by those charged with its execution, especially when it has long prevailed, is entitled to great weight, and should not be disregarded or overturned except for cogent reasons, and unless it be clear that such construction is erroneous."

Again, in *Brewster* v. *Gage*, 280 U. S. 327, the Court held:

> "It is the settled rule that the practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons."

Following down through the years, we find the case of *State of Wisconsin* v. *State of Illinois*, 278 U. S. 399, 413. In that case, referring to the long continued construction of a statute, the Supreme Court held:

> "This construction of § 10 is sustained by the uniform practice of the War Department for nearly thirty years.

> Nothing is more convincing in interpretation of a doubtful or ambiguous statute."

In *Louisville & Nashville Railroad Company* v. *United States*, 282 U. S. 740, the Supreme Court held:

> "The principle is a familiar one that in the interpretation of a doubtful or ambiguous statute the long-continued and uniform practice of the authorities charged with its administration is entitled to great weight, and will not be disturbed except for cogent reasons."

Each of the foregoing cases refers to numerous other cases all of which establish the uniform construction by the courts on each and every occasion where the construction of a statute by the executive departments has been long continued and uniform.

In the case at bar the construction has been that no part of the money expended for beneficial objects under the first proviso to Section 17 of the Act of March 2, 1889 is chargeable against the Sioux Nation Fund arising out of the sale of lands under that Act. This has been the uniform executive construction for more than 50 years, and the Court should take notice of the fact that it is still today the construction of the executive departments having charge of this matter, particularly the Interior Department, the Treasury Department and the General Accounting Office.

Congressional Construction

The permanent appropriation which is contained in the first proviso to section 17 of the Act of March 2, 1889, stood on the statute books continuously to 1933, and under the executive construction the Sioux Benefits provided for by said Section 17 were delivered to the individual Sioux

allottees. They were always charged to the permanent appropriation, never to the Sioux Nation Fund.

During that period of time, all of the individual Sioux Indians who were qualified in accordance with the first proviso to Section 17 of said Act of 1889, were alloted and Sioux Benefits were delivered to them, or the equivalent thereof in money was paid to them or credited to their accounts. By Section 19 of the Act of May 29, 1908, allotments were directed to be made to children of Sioux parentage on the six reservations created by the Act of March 2, 1889. These children were those born subsequent to the date of the President's Proclamation directing allotments to be made on the six reservations. This law of 1908 did not mention Sioux Benefits nor was there any reference to the beneficial objects authorized in the first proviso to Section 17 of said Act of 1889. However, as time passed, the children so alloted under the 1908 Act attained the age of 18 or became head of a Sioux family, and thereupon Sioux Benefits were paid to them as a matter of course and out of the Treasury of the United States. The Comptroller General ruled that Sioux Benefits were not payable to the children of the Sioux families which children were allotted under the Act of May 29, 1908.

Subsequent to this ruling and the stoppage of the payments of Sioux Benefits to the children referred to the Congress passed the Act of May 21, 1928, 45 Stat. 684. That Act provided for the payment of Sioux Benefits to the Sioux Indian children who had been or might be allotted under Section 19 of the said Act of May 29, 1908, 35 Stat. 451, and said Act provided:

> "Claims therefor be paid as formerly from the permanent appropriation made by said Section 17 and carried on the books of the Treasury for this purpose."

The foregoing is a direct interpretation by the Congress of the original provision and appropriation for Sioux Benefits contained in Section 17 of said Act of March 2, 1889.

On June 18, 1934, the President approved the Act of Congress, 48 Stat. 984, which provided:

> "Sec. 14. The Secretary of the Interior is hereby directed to continue the allowance of the articles enumerated in section 17 of the Act of March 2, 1889 (25 Stat. L. 895), or their commuted cash value under the Act of June 10, 1896 (29 Stat. L. 334), to all Sioux Indians who would be eligible, but for the provisions of this Act, to receive allotments of lands in severalty under section 19 of the Act of May 29, 1908 (35 Stat. L. 451), or under any prior Act, and who have the prescribed status of the head of a family or single person over the age of eighteen years, and his approval shall be final and conclusive, *claims therefor to be paid as formerly from the permanent appropriation made by said Section 17* and carried on the books of the Treasury for this purpose. • • •
>
> "Sec. 15. Nothing in this Act shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States. *It is hereby declared to be the intent of Congress that no expenditures for the benefit of Indians made out of appropriations authorized by this Act shall be considered as offsets in any suit brought to recover upon any claim of such Indians against the United States.*" (Emphasis supplied.)

By the Act approved June 26, 1934, 48 Stat. 1224, all "permanent appropriations" were given one more year to run and terminated at July 1, 1935.

But from 1935 to 1945 every Annual Interior Department Appropriation Act has made an appropriation out of Treasury funds, in amounts varying between $150,000 and $250,000, under title "Annuities and Per Capita Payments," in these words:

"For payment of Sioux Benefits to Indians of the Sioux Reservations as authorized by the Act of March 2, 1889 (25 Stat. at p. 895) as amended."[30]

It is a rule of law which has been overlooked by the Court below in its decision, that where the Congress has, by subsequent enactment and with full knowledge of the executive interpretation of a statute, confirmed the statute by re-enactment, such congressional action also confirms the practice and the construction of the executive department. In *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 77 L. Ed. 893, ruling on this particular question, the Supreme Court held:

> "The administrative construction must be deemed to have received legislative approval by the re-enactment of the statutory provision, without material change."

In *National Lead Co.* v. *United States*, 252 U. S. 140, which case came up from the Court of Claims (53 Ct. Cl. 635), in passing upon the effect of congressional re-enactment of a statute which had long been construed, this Court held:

> "The construction of this statute and the reasonable regulation thereunder have been in effect for over half a century; where questioned they have been approved by the courts; and by constant re-enactment and failure to make any change they must be held to have been approved by Congress, and the question is no longer open."

It is worthy of especial note that the Act approved July 1, 1946, Public Law 478—79th Congress, making appropriations for the Department of the Interior for the fiscal year

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[30] 49 Stat. 196; 49 Stat. 1780; 50 Stat. 591; 52 Stat. 318; 53 Stat. 713; 54 Stat. 432; 55 Stat. 330; 56 Stat. 530; 57 Stat. 471; 58 Stat. 485.

ending June 30, 1947, on page 12 thereof, again makes an appropriation of $150,000, in the following words:

> "For payment of Sioux benefits to Indians of the Sioux reservations, as authorized by the Act of March 2, 1889 (25 Stat. 895), as amended, $150,000."

The decision of the Court below was entered on February 4, 1946, nearly five months before the Congress again reaffirmed the long continued construction of the first proviso to Section 17 of said Act of March 2, 1889. The Congress and the Bureau of the Budget have ample facilities for knowing the decisions of the Courts, including the decisions of the Court below. The Congress, however, has seen fit to appropriate again the money out of the Treasury to pay Sioux Benefits. The decision of the Court below is wholly inconsistent with the Congressional construction of the said Act of 1889 and is a reversal of the decision of the courts, especially of this Court, above cited.

Conflict of Decisions

Petitioner can not show a conflict of decisions by the Circuit Courts of Appeals for the reason that those courts do not have jurisdiction in Indian cases, like the instant case. Petitioner can show that the decision in the case at bar is inconsistent with an earlier decision by the Court below, wherein the parties were the same and the subject matter was the same but which case arose under the Treaty of April 29, 1868, supra.

Under the Sioux Jurisdictional Act of June 3, 1920, the Sioux Tribe brought suit in the Court of Claims for seeds and agricultural implements promised by Article 8 of said Treaty of 1868 to all individuals of the Sioux Tribe who might select lands and commence farming. The case came on to be heard and was decided adversely to the plaintiff,

the Sioux Tribe, Ct. Cl. 89, p. 31. In concluding its decision the Court of Claims held:

> "In addition to the fact that the evidence submitted is not sufficient to justify the conclusion that the United States has violated the provisions of Art. 8, we are of opinion that the plaintiff tribe cannot maintain suit and recover on this character of claim for the reason that it is not a tribal claim but concerns the rights of and obligations to individual Indians, members of the Sioux Tribe. *Price et al.* v. *United States,* 174 U. S. 373, 375; *Blackfeather, et al.* v. *United States,* 37 C. Cls. 233, affirmed in *Blackfeather* v. *United States,* 190 U. S. 368, 374, 375, 378. The Jurisdictional Act of June 3, 1920, 41 Stat. 738, authorizes plaintiff to institute suit in this court only for amounts claimed to be due such tribe or band, or bands thereof, as tribal claims. The jurisdictional act does not give the court jurisdiction to hear and determine the legal and equitable claims of individual Indians. *Cherokee Nation* v. *United States,* 80 C. Cls. 1, 3, 4.
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> "The petition is dismissed. It is so ordered."

So in the Court of Claims the Sioux Tribe was denied the right to maintain a claim because it was not a tribal claim but was an individual claim. Quite to the contrary, however, in the instant case, payments to individual members of the Sioux Tribe were utilized as an offset against a tribal claim. If an individual claim can not come into the Court of Claims under the Jurisdictional Act of June 3, 1920 (pp. 8-9), then a payment to an individual should not be used as an offset against a tribal claim. The two decisions can not be reconciled, they are in absolute conflict.

Conclusion

In view of the foregoing and on the record, petitioner submits that the following have been established:

1. On the face of the first proviso to Section 17 of the said Act of 1889 disbursements to individuals for Sioux

Benefits are not reimbursable to the United States out of Sioux trust funds derived from the sale of Sioux lands.

2. The representations made to the Sioux Tribe by the Sioux Commission were that Sioux Benefits were not to be charged against those same Sioux Trust funds.

3. The long continued Executive construction (57 years) of said proviso was that Sioux Benefits were payable by the United States and were not reimbursable.

4. The repeated reinactment by the Congress of the Sioux Benefit provision and the repeated appropriation of money from the Treasury to pay Sioux Benefits, is positive construction that Sioux Benefit expenditures were and still are not reimbursable out of Sioux Trust funds.

5. The Sioux Jurisdictional Act does not authorize payments to an individual Sioux Indian as an offset against a claim of the Sioux Tribe.

The petition should be granted.

Respectfully submitted,

RALPH H. CASE,
Attorney for Petitioner.

Of counsel:
JAMES S. Y. IVINS.